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IN THE

SUPREME COURT OF THE UNITED STATES

....., SESSION, 1958.

No. 799

FRED FERGUSON, *Petitioner-Plaintiff,*

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent-Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI, AND APPENDIX

Jo B. GARDNER,
SAM R. GARDNER,
Masonic Building,
Monett, Missouri,
Attorneys for Petitioner, Plaintiff.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

INDEX

Summary and Short Statement 2
Jurisdiction 3
The Questions Here Presented Are Substantial 3
Opinions Below 4
Questions Presented for Review 4
Statute Involved 5
Reasons Relied On for Granting the Writ 5
Suggestions Why the Writ Should Be Granted 6

Appendices—

Opinion of Supreme Court 1A
Dissenting Opinion 8A

Cases Cited

Bailey v. Central Vermont Ry. Co., 319 U.S. 350, 87 L.ed. 1444 ..... 5, 9, 17, 19

Brown v. Western Railway Co., 338 U.S. 294, 94 L.ed. 100 3

Employer's Liability Act, Title 45, U.S.C.A., Sec. 51 ..... 5, 13, 20

Hake v. Buck's Stove & Range Co., 234 S.W. 1061, 1065 (Mo.) 13-14

Labonte v. N. Y., etc., Ry. Co., 351 U.S. 974, 100 L.ed. 1492 17

Lavender v. Kurn, 327 U.S. 645, 90 L.ed. 916, 923 17

New Hampshire Fire Ins. Co. v. Rupard, 220 S.W. 538, 187 Ky. 671 20

Pasquale Palermo v. Steamship Co., Inc., 2 L.ed. 2d 1, reversed 246 F.2d 557 ..... 11, 12

Rogers v. Missouri Pacific Ry. Co., 284 S.W. 2d 147 (Mo.), reversed 352 U.S. 500, 1 L.ed. 2d 493 2, 6, 9, 18, 19

Schultz v. Penn. R. Co., 350 U.S. 523, 100 L.ed. 668 17

Schwartz v. K. C. S. Ry. Co., 275 S.W. 2d l.c. 237 15

Snyder v. Lehigh Valley Ry. Co., 245 F.2d 112, 117 16

Stone v. N. Y. Central, 344 U.S. 407, 97 L.ed. 441, 445. 17

Thompson v. Gibson, 290 S.W. 2d 305, reversed 2 L.ed. 2d 1 12, 13

Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 58, 87 L.ed. 610, 612 16, 18

Transatlantic Fire Ins. Co. v. Bamberger, 11 S.W. 595, 11 K.L.R. 117 20

Webb v. Ill. Central R. Co., 352 U.S. 512, 1 L.ed. 2d 503 19

Wilkerson v. McCarthy, 336 U.S. 53, 93 L.ed. 497, 504 12

Zacharitz v. St. Louis-San Francisco Ry. Co., 81 S.W. 2d 608, 611, 336 Mo. 801 15

54 C.J. 736 20

28 C.J.S. 835 21

Rule 38, 5(a) Supreme Court Rules, Title 28, U.S.C.A. Rules, page 67 6

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI, AND APPENDIX.

To the Honorable, the Chief Justice, and Associate Justices, of the Supreme Court of the United States:

Your petitioner, plaintiff in the above entitled cause, by his counsel, respectfully petitions that a writ of certiorari issue out of this Court to review a final judgment of the Supreme Court of Missouri in the above entitled cause, in favor of defendant, therein, and against petitioner, by which your petitioner was denied a recovery against defendant for damages for personal injuries sustained by petitioner

while employed by defendant in interstate commerce in defendant's railroad yards in Joplin, Missouri, on May 21, 1954.

Final judgment was rendered in said cause on November 12, 1957. Motion for rehearing was denied December 9, 1957, and thereupon said judgment became final.

SUMMARY AND SHORT STATEMENT.

This is an action for personal injuries sustained on May 21, 1954, by plaintiff while employed by defendant in its railroad yards at Joplin, Missouri. Plaintiff alleged that he was engaged in interstate commerce when injured, and charged defendant with negligence in failing to furnish him a reasonably safe place to work, in that defendant failed to erect and maintain a barrier or guard rail along a ditch, near which plaintiff was required to work in cleaning switch lamps, and while watching and inspecting passing trains, on account of which plaintiff was caused to fall into the ditch and sustain injuries.

A trial of the case was had in the Circuit Court of Lawrence County, Missouri; and, at the close of the evidence, the trial court directed a verdict for defendant and entered judgment denying any recovery to plaintiff. The trial court relied exclusively on the case of *Rogers* v. *Missouri Pacific Ry. Co.*, 284 S.W. 2d 467, decided by the Missouri Supreme Court November 14, 1955. That was before the Rogers case was reversed by this Court. 352 U.S. 500, 1 L.ed. 2d 493.

From this judgment plaintiff appealed to the Supreme Court of the State of Missouri, where the case was heard in Division One of said Court, and said judgment was affirmed by Division One of said Court and opinion filed on June 10, 1957 (Appendix "A", herewith).

Whereupon, on motion of plaintiff, said cause was transferred to Court *en banc*, and heard by the entire Court; and the opinion and decision of the Court in Division was adopted. A dissenting opinion was filed in court *en banc* (Appendix "B", herewith). Judgment was rendered by the Supreme Court of Missouri, *en banc*, in favor of defendant, November 12, 1957. Plaintiff then filed a motion for a rehearing, which was by the Court *en banc*, overruled on December 9, 1957.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U.S.C.A., Section 1257 (3), because of the violation by defendant of a right and privilege granted plaintiff under the Federal Employers' Liability Act, to-wit: The right to maintain an action for personal injuries against defendant Railroad Company for personal injuries sustained by him while engaged in interstate commerce, and the right to have his case determined by a jury. The rights here asserted are federal rights. *Brown* v. *Western Railway Co.*, 338 U.S. 294. 94 L.ed. 100.

THE QUESTIONS HERE PRESENTED ARE SUBSTANTIAL.

The questions presented to this Court for decision are substantial, and call for a review of the decision and judgment of the Supreme Court of Missouri in this action.

They disclose the errors committed by that Court: First, the Missouri Supreme Court erred in holding as a matter of law that the evidence adduced does not show any negligence, and does not permit the inference, or authorize a jury to infer, that the defendant was negligent.

Second, it erred in holding as a matter of law that, if the defendant was guilty of the negligence charged, there was no causal connection thereof with plaintiff's injuries; and that the evidence was insufficient to authorize a jury to infer any such causal connection. Third, it also erred in holding as a matter of law that plaintiff was guilty of contributory negligence, and that such contributory negligence was the sole cause of his injuries.

The state court erroneously applied the doctrine of assumption of risk to this case, under the name and designation of non-negligence; and, also, applied the doctrine of contributory negligence under FELA as affording a complete defense to the action, under the name and designation of "sole cause." All contrary to recent cases by this Court.

OPINIONS BELOW.

The opinion of Division One of the Supreme Court of Missouri, adopted by the court *en banc*. appears as Appendix "A" as a part of this petition.

The dissenting opinion filed in the Supreme Court of Missouri appears as Appendix "B", as a part of this petition.

The opinions and judgment of said court were filed and entered November 12, 1957. Thereafter, petitioner as plaintiff, filed his motion in said court for rehearing of said cause, which said motion was overruled December 9, 1957. Said judgment thereupon became final.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the evidence is sufficient to authorize a jury to find negligence on the part of defendant, or to infer negligence on the part of defendant, in failing to furnish plaintiff a reasonably safe place to work.

2. Whether the evidence is sufficient to warrant a jury in finding, or inferring, that defendant's negligence played any part in producing plaintiff's injuries.

3. Whether or not the contributory negligence of plaintiff, if any, is a question for a jury to decide, rather than the court; and whether his negligence should be considered as a complete defense to the action, or merely in reducing the amount of recovery.

STATUTE INVOLVED.

The Employer's Liability Act, Title 45, U.S.C.A., Section 51, under the heading "Liability of Railroads."

REASONS RELIED ON FOR GRANTING THE WRIT.

Petitioner has been denied a right granted to all railroad employees injured while engaged in interstate commerce—that is, the right to a trial by a jury. As said by this court in *Bailey* v. *Central Vermont Ry. Co.*, 319 U.S. 350, 87 L.ed. 1444:

> "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

Under recent and controlling decisions of this court, analogous to this case, we submit that the evidence is sufficient to authorize a jury to find or infer negligence on the part of defendant in failing to furnish plaintiff a reasonably safe place to work, and that such negligence played a part in producing plaintiff's injuries. We submit that the evidence is sufficient to support all the findings set out in the dissenting opinion filed herein.

The Supreme Court of Missouri has misconceived the law as declared by this court in *Rogers* v. *Missouri Pacific Ry. Co.*, 352 U.S. 500, 1 L.ed. 2d 493. Three of the seven pages of the opinion are devoted to the Rogers case. The Missouri court refused to follow that case, but did undertake to distinguish it from the case at bar.

It is apparent that the Missouri court entirely misconceived the law as declared in the Rogers case. This maladministration of the Federal Employer's Liability Act should not be permitted to stand.

This is sufficient reason for granting the writ. *Rule 38, 5(a) of the Supreme Court Rules, Title 28, U.S.C.A. Rules, page 67.*

We, therefore, respectfully pray that certiorari issue to the Supreme Court of the State of Missouri for review of their judgment and decision in this case; and that said judgment be reversed.

Jo B. Gardner,
Sam R. Gardner,
Masonic Building,
Monett, Missouri,
Attorneys for Petitioner, Plaintiff.

SUGGESTIONS WHY THE WRIT SHOULD BE GRANTED.

I.

The state court does not hold specifically that the defendant was not negligent. It merely holds (the last paragraph of the opinion) that:

> "The record is devoid of any evidence from which negligence on the part of defendant may be inferred

which contributed to cause plaintiff's injuries." (Emphasis ours).

Apparently the court went off on the question of proximate cause. However, the language of the court is ambiguous. On this question, as well as the question of negligence, a short statement of the facts is essential to show that both questions were for a jury.

There was evidence to warrant a jury in finding negligence on the part of defendant. The ditch, some four feet deep, actually abutted the sidewalk where plaintiff worked (Tr. 24). Its presence there, unguarded as it was, in such close proximity, constituted an ever present danger. The presence of this ditch is an important factor in the case. Plaintiff's duties took him over the entire yards in Joplin, in caring for switch lamps, picking up papers over the yards, leveling up places, examining switches, etc. (Tr. 32, 33). He was not ordered to work at any particular place; but certain of his duties required him to be at certain places; and cleaning the lamp at this switch required him to be at this particular location, which was in close proximity to this unguarded ditch. Defendant knew he had been in the habit of using the sidewalk as a place to clean this lamp. The assistant foreman had seen him so engaged (Tr. 76-77). This location was, therefore, plaintiff's place to work on this occasion. The switch stand was north of the sidewalk, something like eight feet from the open part of the ditch (Tr. 24). From where plaintiff squatted down on the sidewalk to the east rail of the track was thirteen and a half feet (Tr. 66).

But plaintiff had other duties than to squat at the place of cleaning this lamp. A train was approaching and it was a part of his duties, and this is undisputed—to make a running inspection of this train as it passed. It was

approaching on a curve so he could see both sides of the train. In addition to watching for hot boxes and anything else which might be wrong, he must accept and answer a signal from the engineer as to whether he would close the switch which they had just passed through, or whether they would have to stop the train for one of the train crew to close it. The train was near at hand, some 175 to 180 feet away, when plaintiff raised to standing position and returned the engineer's signal. Plaintiff testified (Tr. 40):

> "I never taken my eye off the train. I was watching the train because that was customary, and also had to get back away from the switch. My mind was on watching the train and getting myself * * *."

It was while plaintiff was in that position that he stepped backward and fell into the ditch.

II.

Certainly the ditch, unguarded as it was, was an ever present danger. The only difference between a ditch and a precipice is one of degree, not one of principle. No reasonably prudent employer would permit a precipice to remain unguarded in such close proximity to an employee's place of work. A fair minded juror could, with reason, conclude that a guard rail would have prevented plaintiff's fall, or, at least, if he did step into the ditch, a guard rail would have prevented his falling to the bottom of the ditch. A fair minded juror could, with reason, conclude, not only that defendant was negligent in failing to place a barrier there, but could, with reason, also conclude that the unguarded ditch "played a part in plaintiff's injuries." Hence both questions were for a jury; not for the court.

This action is brought under the Federal Employer's Liability Act. The law of the case both as to negligence and causation is found in the construction of that Act by this court; and not the construction placed on the Act by state courts.

Negligence at common law as declared and interpreted by state courts is not applicable. Negligence in cases under the Act is to be determined by the common law as construed and interpreted by federal courts. *Bailey* v. *Central Vermont Ry. Co.*, 319 U.S. 350, 87 L.ed. 1444.

The state courts need more education along this line. Seemingly it has been difficult for the Missouri Supreme Court to keep step. This is a statutory action. As said by this court in *Rogers* v. *Missouri Pacific Ry. Co.*, 352 U.S. 500, 1 L.ed. 2d 493, 500:

> "The law was enacted because Congress was dissatisfied with the common law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played a part, however small, in the injury or death which is the subject of the suit. * * *.
>
> "The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that makes it significantly different from the ordinary common-law negligence action, has required this court to review a number of cases."

III.

1. The Supreme Court of Missouri erroneously held, in effect, that the act of plaintiff in stepping backward to get in position to inspect the passing train, was the sole cause of his injuries.

2. The opinion recites:

> "It was in evidence that plaintiff had been using the sidewalk as a place for cleaning the lamp at this place for a long time with the knowledge of defendant. Plaintiff also conceded that he was not directed as to where he should be when making a running inspection of the train; only that he was required to be at a proper distance. In this instance, plaintiff was not required to cross the ditch in question to arrive at a proper place to make the inspection. In fact, the ditch was not in the direction where plaintiff *should have gone. If plaintiff desired to move away from the tracks, he could follow the sidewalk. Furthermore, plaintiff was not required to walk backward.*" (Emphasis ours.)

This, clearly, is a holding that the act of plaintiff in stepping backward, was the sole cause of his injuries. This, taken in connection with the further statement in the opinion that:

> "We hold that the record in this case is devoid of any evidence from which negligence on the part of defendant may be inferred which *contributed to cause plaintiff's injuries.*" (Emphasis ours).

Thus, it is demonstrated that the Missouri court determined as a matter of law that plaintiff's negligence was the sole cause of his injuries. This was a jury question, under recent decisions of this court.

In other words, the Supreme Court of Missouri holds, as a matter of law: First, that there was no negligence on

the part of defendant; and, second, that if there was negligence there was no causal connection between that negligence and plaintiff's injuries, but that plaintiff was the author of his own injury, or the court might well have said, misfortune.

We submit that the evidence does not warrant this conclusion, and that such holding runs counter to controlling decisions of this court. In the recent case of *Pasquale Palermo* v. *Steamship Co., Inc.*, 78 S. Ct. 1, 2 L.ed. 2d 1, decided by this court October 21, 1957, defendant claimed error in the trial court's refusal to charge the jury that plaintiff was barred from recovery, as a matter of law, if he voluntarily chose the use of the passageway in which he was injured when there was a safe passageway to his place of work, which he could have used and of which he knew or could have known. The Court of Appeals for the Second Circuit reversed on the ground that failure to give this instruction was reversible error (246 F.2d 557).

In reversing the Court of Appeals, this court said:

> "We hold that the trial court did not commit reversible error in refusing to charge respondent's request No. 12. The petitioner's alleged choice of a more dangerous route did not, under the evidence, operate to bar a recovery as a matter of law."

This court went along with the dissenting opinion in that case, of Chief Justice Clark, Second Circuit. In speaking of the alleged negligence, in allowing a three inch sill to remain across a walkway used by employees, near where there was oil and grease on the floor, where plaintiff slipped and fell, language used in the dissenting opinion of Justice Clark is here pertinent (l.c. 563):

> "Often, where the continued presence of the peril serves no important useful purpose to the defendant

> and the cost of removing is small, a reasonable man will remove the danger, and not just warn of it. * * *. How simple it would have been to replace the burned out light, wipe up the grease, and prevent the accident."

The ditch in the case at bar apparently served no useful purpose and a barrier could readily have been placed there, at little expense, similar to one formerly there. If any negligence rested with plaintiff in stepping backward into the ditch, it should have been considered only as contributory negligence in reducing the damages, and not as sole cause as a matter of law. *Wilkerson* v. *McCarthy*, 336 U.S. 53, 93 L.ed. 497, 504; *Palermo* v. *Steamship Co.*, *supra*.

In *Thompson* v. *Gibson*, 290 S.W. 2d 305, Civil Court of Appeals, Fort Worth, plaintiff, an engineer, while crossing defendant's yards to take his engine out on a run, was injured when his foot slipped and turned on loose gravel, causing the toe of his shoe to catch under the web of a rail and sprain his knee. The gravel varied in size and had been placed there some six months previously. There was no particular path or defined way across the yards, where much switching was being done, so that employees crossing the yards had to zigzag between moving cars and engines. The negligence charged was that defendant had not provided plaintiff a reasonably safe place to work. In affirming a judgment for plaintiff, the court said, l.c. 308:

> "* * * the jury was warranted in finding that the defendant was negligent in failing to pack the gravel used and that such negligence was a proximate cause of plaintiff's injuries."

The Supreme Court of Texas reversed on the ground of insufficiency of the evidence to establish negligence on the part of defendant, which contributed to plaintiff's injuries. This court granted certiorari. The case is reported

in 2 L.ed. 2d 1. This court went along with the Court of Civil Appeals and reversed the Supreme Court of Texas. In so doing, this court said:

> "We hold that the proof justified with reason the jury's conclusion that employer's negligence played a part in producing petitioner's injuries."

This holding is supported by a long list of recent cases by this court, under the Federal Employer's Liability Act. All the cases cited appear in 1 L.ed. 2d: *Rogers* case at pp. 503, 515; the *Webb* case at 503, 515; the *Ferguson* case at 511, 515; the *Shaw* case at 718; the *Futrelle* case at 718; the *Deen* case at 721; the *Thompson* case at 722; the *Arnold* case at 889; the *Ringhiser* case at 1268; and the *McBride* case at 1534. Employees in *Thompson* v. *Gibson*, *supra*, were at liberty to cross in any portion of the yards, as there was no path or designated place provided for that purpose, yet this court held that the duty existed to provide employees a safe place to work.

IV

In the case at bar, while plaintiff's duties required him to be at various places over defendant's yards, yet, in cleaning switch lamps and watching passing trains, his place of work was pretty definitely determined to be at a switch—this switch—near the ditch.

A place to work

> "* * * is not restricted to the identical situs of the labor, but extends to the exercise by the employer of ordinary care to see that * * * all places about the premises, known to the master to be used, or which might by the use of ordinary care be so known to be used, by the employees." (*Hake* v. *Buck's Stove & Range Co.*, 234 S.W. 1061, 1065 (Mo.), and cases cited).

As said by this court in the *Rogers* case, *supra*, l.c. 497:

"These were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that the petitioner, in performing the duties required of him, would suffer just such an injury as he did."

V.

Another glaring error in the Missouri Supreme Court decision appears in the following language in the opinion:

> "In fact, the ditch was not in the direction where plaintiff *should have gone*. If plaintiff desired to move away from the tracks, *he could follow the sidewalk*. Furthermore, *plaintiff was not required to walk backward*." (Emphasis ours).

It is novel, to say the least, for a court to say just which way an employee *should go*, and that in changing his position he should follow the sidewalk, and should not step backward, but should face about and go forward, and to deny him a recovery because he did not do what the court thought he should have done. This does not allow for the frailties of human nature; does not allow an employee, however loyal and devoted to duty he may be, to make a misstep. It places him in a straight jacket, and requires of him the highest degree of care.

Such misbehavior, if any, on the part of the plaintiff amounted to no more than contributory negligence, which, under the FELA, merely mitigates; it does not defeat a recovery.

VI.

While the court does not specifically mention "assumption of risk", yet language in the opinion clearly indicates that the court had that doctrine in mind, and gave effect to it, as originally declared in Missouri, as follows (p. 3 of Opinion, Appendix "A"):

"* * *. It was in evidence that plaintiff had been using the sidewalk as a place to clean the lamp at this place for a long time with the knowledge of the defendant: * * *.

"It is a well known fact that all railroad tracks and yards are beset with embankments, drainage ditches, culverts, and other offsets and that it would be impracticable to have guardrails at all of such places for the protection of employees."

In other words, plaintiff must have known of the ditch and its close proximity to the switch stand, and, therefore, he must take things as he finds them. This is a clear application of the now antiquated doctrine of "assumption of risk". This statement can best be understood when we examine some of the earlier opinions of the author of this opinion. As early as 1936, in *Zacharitz* v. *St. Louis-San Francisco Ry. Co.*, 81 S.W. 2d 611, 336 Mo. 801, this same author, in reversing outright a judgment for plaintiff, and when the doctrine of "assumption of risk" was running riot in Missouri, says, in almost the exact language of the opinion here:

"The operation of a railroad is necessarily attended by some danger. It would be impossible to so equip the engines and cars as to eliminate all danger of employees being hurt. * * *. As long as railroads are operated, employees will, from time to time, fall from the cars and engines and otherwise be injured."

And again, in *Schwartz* v. *Kansas City Southern Ry. Co.*, 275 S.W. 2d l. c. 237, this same author, in reversing outright a judgment for plaintiff, says (notwithstanding the 1939 amendment to the act):

"Many hazards are encountered by employees in the industrial world that no amount of care or foresight can avoid."

As a basis for the last above statement, the author cites and quotes from the concurring opinion of Mr. Justice Frankfurter in the *Tiller* case, 318 U.S. 54, 87 L.ed. 610, in which Justice Frankfurter said:

> "In denying recovery to an employee injured as a result of exposure to such a hazard, where the employer has in no sense been negligent or derelict in the duty owed to his employees, courts have often said that the employee assumed the risk."

In *Tiller* v. *Railroad*, 318 U.S. 54, 58, 87 L.ed. 610, 612, this court said:

> "We hold that every vestige of the doctrine of assumption of risks was obliterated from the law (of FELA) by the 1939 amendment, and that Congress, by abolishing the defense of 'assumption of risks in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'. * * *. Unless great care be taken, the servants' rights will be sacrificed by simply charging him with assumption of risks under another name, and no such result can be permitted."

Possibly the last expression on this question is found in the case of *Snyder* v. *Lehigh Valley Ry. Co.*, 245 F.2d 112, 117, decided June 5, 1957, Third Circuit, as follows:

> "We do not agree with the trial judge's view that a verdict should have been directed for the defendant. The Supreme Court in Federal Employers Liability Act cases has time and again condemned directed verdicts for the defendant on the ground of insufficiency of evidence. * * * So long as an evidentiary basis for jury verdict exists, the jury should be permitted to exercise its judgment."

We submit that the holding of the Missouri Supreme Court in this case, that the evidence is insufficient to warrant a jury in finding negligence on the part of the defend-

ant in not placing a guardrail along said ditch, is, in effect, giving force to the now antiquated doctrine of assumption of risks under the name of non-negligence.

That the ditch constituted an ever present danger cannot be disputed. Plaintiff's place of work in cleaning the switch lamp and making an inspection of the train, was in close proximity to said ditch.

The fact that reasonable men might differ as to the propriety of placing a guardrail there for the protection of employees so engaged makes this a jury question. *Lavender v. Kurn*, 327 U.S. 645, 90 L.ed. 916, 923; *Stone* v. *N. Y. Central*, 344 U.S. 407, 97 L.ed. 441, 445; *Labonte* v. *N. Y. etc., Ry. Co.*, 351 U.S. 974, 100 L.ed. 1492.

That reasonable men did so differ is ample ground for submission of the case to a jury. (We know that the author of the dissent was a reasonable man, and for the purposes of argument, we will assume that the other judges are also reasonable men.)

In *Bailey* v. *Central Vermont Ry. Co.*, 319 U.S. 350, 87 L.ed. 1444, 1447, this court said:

> "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

As said by this court in *Schultz* v. *Penn. R. Co.*, 350 U.S. 523, 100 L.ed. 668:

> "The jury trial is part and parcel of the remedy afforded railroad workers under the Employer's Liability Act."

It is apparent that the Missouri court still clings to the now antiquated doctrine of assumption of risk as a defense to an action under FELA. Applies it as non-negligence. Also applies contributory negligence as a complete defense.

Assumption of risk has been completely abolished by this court. *Tiller* case, *supra; Rogers* v. *Missouri Pacific Ry. Co.*, 352 U.S. 500, 1 L.ed. 2d 493. And contributory negligence is not a complete defense, but only mitigates. *Tiller* case, *supra.*

It matters not whether this be designated assumption of risk or non-negligence.

> "By abolishing the defense of assumption of risks * * * Congress did not mean to leave the identical defense for the master by changing its name to non-negligence." (*Tiller* case, *supra*).

VII.

On page 3 of the Opinion of the Missouri Supreme Court appears this remarkable statement:

> "It would be impracticable to have guardrails at all of said places for the protection of employees."

We say remarkable, for the reason there was no evidence in the case, and nothing developed in the facts, to indicate that it was impractical, or would be too expensive, to erect a guardrail at the ditch where plaintiff was injured. On the other hand, it appears from the evidence that it was not only practical, but, as a matter of fact, a guardrail was maintained at this exact point in the not too distant past (Tr. 22, 23, 75, 76).

VIII.

The Federal Employer's Liability Act, in stating that the carrier is liable for injuries or death, "resulting in whole or in part" from its negligence, entirely eliminates "proximate cause"; in fact, it eliminates the question of causation. The question now is, did negligence play any part, however slight, in producing the injury? *Rogers* case,

supra; *Webb* v. *Ill. Central R. Co.*, 352 U.S. 512, 1 L.ed. 2d 503.

The word "cause" does not appear anywhere in the Act. The carrier is made liable for all injuries "resulting" from its negligence. The fact that Congress did not mention "cause" clearly indicates that it meant to make a distinction between the two words, "cause" and "resulting." And there is quite a difference. Now we are to determine what injuries "resulted" from the carrier's negligence, rather than what "caused" the injury.

Nothing has proved more confusing in the law of negligence than the question of causation, particularly "proximate cause." No satisfactory definition of that term has ever been formulated. Congress evidently was dissatisfied with this conglomerate confusion of terms and contrariety of decisions by courts, and sought to eliminate it; and, we think, did eliminate it; but state courts have been loath to break away from their former holdings.

This court is, however, getting around to a proper interpretation of the Act. *Rogers* and *Webb* cases, *supra*.

What were formerly questions of law for the court—that is, proximate cause and causation—are now questions for a jury; "except in the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employers played any part in the employee's injury * * *. Judges are to fix their sights to make that appraisal." *Rogers* case, *supra*, l.c. 501; *Bailey* v. *Central Vermont Ry. Co.*, 319 U.S. 350, 87 L.ed. 1444.

The Judges of the Supreme Court of Missouri differed in their conclusion on the facts of this case. A dissenting opinion was filed. (It appears here as Appendix "B".) In this dissenting opinion the Judge said, among other things:

"I believe the evidence would support a finding by the jury:

"1. That the sidewalk had become an established place of work.

"2. That plaintiff in moving to inspect trains would make use of the sidewalk.

"3. That the ditch was inherently and patently dangerous to an employee performing such work.

"4. That a steel guardrail had been maintained at the point where plaintiff fell into the ditch, and that it was reasonably feasible for defendant to have continued to maintain a similar device.

"5. That defendant was negligent in failing to furnish plaintiff a reasonably safe place to work, and

"6. That defendant's negligence directly contributed to plaintiff's fall and injuries."

The word "result" or "resulting", used in the Federal Employer's Liability Act expresses the exact opposite of "cause" or "causing." As a verb, "cause" is transitive and implies an effect or result; while "result" is intransitive and connotes the termination or end; a consequence; the effect; that which springs or rebounds back from some preexisting thing.

54 C.J., p. 736.

In *Transatlantic Fire Ins. Co. v. Bamberger*, 11 S.W. 595, 11 K.L.R. 117, the court, in speaking of the meaning of the word "result", said:

"The word result is in common use by all classes—the lettered as well as the unlettered. The lettered know that the word means that which springs or rebounds back from some preexisting thing. The unlettered know, from its daily practical application, that

it means the same thing—as the floods of the river are the result of the rains or melting of snow; the earth is parched as the result of heat and drought; a person's life is lost as the result of a fall; the building in question fell as the result of fire. Indeed, the meaning of the word is so generally understood by all classes that a person who fails to readily comprehend its meaning, though not scholar enough to express it classically, should be excluded from the jury box on the ground of incompetency."

Under a fire insurance policy the insurer is liable for damage by explosion where the explosion resulted from the fire, even though the policy expressly exempted damage by explosion. *New Hampshire Fire Ins. Co.* v. *Rupard*, 220 S.W. 538, 187 Ky. 671.

28 C.J.S., p. 835, defines "effect" as a result produced; a result that follows after a thing previously spoken of as completed; a result or conclusion which follows a given act; that which follows from an antecedent called the cause.

We have found no authority, either literary or legal, that the word "result" or "resulting" is used synonymously with the word "caused." And no authority to justify this court, or any other court, in holding that Congress, in using the word "resulting" meant the same as if it had used the word "caused."

Recent *per curiam* decisions of this court demonstrate that a majority of the present Justices are committed to the sound policy of exercising certiorari power to review and correct instances of maladministration of the FELA by lower state and federal courts which persist in depriving litigants of their federal right to the determination of fact questions by a jury.

In view of the close analogy of this case with recent decisions of this court in cases under FELA we respectfully submit that certiorari be granted and the judgment below be reversed.

Respectfully submitted,

Jo B. GARDNER,
SAM R. GARDNER,
Masonic Building,
Monett, Missouri,
Attorneys for Petitioner, Plaintiff.

APPENDIX A.

IN THE SUPREME COURT OF MISSOURI,
EN BANC

SEPTEMBER SESSION, 1957

FRED FERGUSON,
Plaintiff-Appellant,
vs.
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Defendant-Respondent.

No. 45529.

APPEAL FROM THE CIRUIT COURT OF LAWRENCE COUNTY.
HON. ROBERT STEMMONS, JUDGE.

This is an action brought by plaintiff Ferguson under the Federal Employers' Liability Act to recover damages in the sum of $65,500 for personal injuries sustained when plaintiff while performing his duties fell into a ditch or water drain. Plaintiff's trial theory was that the defendant failed to furnish plaintiff a safe place to work. At the close of plaintiff's case, the trial court directed a verdict for the defendant and plaintiff appealed.

The case was filed and tried in the Circuit Court of Lawrence County, Missouri. Plaintiff's injuries were sustained about 9:00 a.m., on May 21, 1954.

Plaintiff had been in defendant's employ for many years. For eleven years before his injury, plaintiff had been a lamp tender in the yards at Joplin, Missouri: His duties were cleaning and refueling switchstand lamps. In addition to the duty of keeping the lamps in order, plain-

tiff, as well as other employees working in and about the railroad tracks, was required to make what was termed a "running inspection" of passing trains. Such an inspection required no more of an employee than to take a position 15 or 20 feet from the tracks and from there look at the train to see if any rods were loose or dragging or if any "hot boxes" were to be seen. Still another duty of plaintiff was to throw a switch when necessary after a train had passed; plaintiff on signal from the train crew would perform this task. This precluded the necessity of stopping the train to permit a member of the crew to throw the switch.

On the morning plaintiff was injured, he was cleaning and refueling a lamp taken from a switchstand at defendant's main line located at the west end of 7th Street overpass in Joplin, Missouri. Plaintiff had taken the lamp apart and laid the parts on a sidewalk which intersected the railroad tracks. Plaintiff was in a squatting position on the sidewalk while performing this task at a point a few feet from the lamp post and about 10 to 12 feet from the tracks. The tracks at this point ran north and south; the sidewalk, extending eastwardly from the tracks, ran in a northeasterly direction. While plaintiff was working with this lamp, he heard a train coming and looking he saw the train about 200 feet or so away. The train was traveling about 10 to 12 miles per hour. Plaintiff arose from his squatting position and acknowledged a signal from the engineer to throw the switch after the train had passed. Plaintiff was then not far enough away from the tracks to make a running inspection of the train so he began moving away from the tracks by stepping backward. He stepped off the sidewalk and into a ditch or water drain about four feet deep at the south edge of the sidewalk. Plaintiff's theory is that defendant was negligent

by not having a guardrail at the south edge of the sidewalk.

Plaintiff, in oral argument, conceded that the place to clean the lamp was not unsafe; also that the place to make the inspection of the train was not unsafe. But that the combination of the duties, that is, transferring from the duty of cleaning the lamp to that of inspecting the oncoming train, required him to move back to a position from which he could make the inspection; that in so doing, he stepped off into the ditch; that, therefore, the place was unsafe. To this we cannot agree. Plaintiff concedes that he selected the place for cleaning the lamp; that he had never been directed or instructed where to do this work. It was in evidence that plaintiff had been using the sidewalk as a place to clean the lamp at this place for a long time with the knowledge of the defendant. Plaintiff also conceded that he was not directed as to where he should be when making a running inspection of a train; only that he was required to be at a proper distance. In this instance, plaintiff was not required to cross the ditch in question to arrive at a proper place to make the inspection. In fact, the ditch was not in the direction where plaintiff should have gone. If plaintiff desired to move away from the tracks, he could follow the sidewalk. Furthermore, plaintiff was not required to walk backward.

It is a well known fact that all railroad tracks and yards are beset with embankments, drainage ditches, culverts, and other offsets and that it would be impracticable to have guardrails at all of such places for the protection of employees.

Plaintiff relies upon the case of *Rogers* v. *Missouri Pacific Railroad Co.*, 1 L.ed 2d 493, decided by the United States Supreme Court, which court disapproved the opin-

ion by this court in that case (then styled *Rogers* v. *Thompson* and reported at 284 S.W. 2d 467). This court had held the plaintiff Rogers' evidence was insufficient to establish liability against the defendant. Rogers claimed he had not been furnished a safe place to work. An examination of the opinion will disclose that the circumstances surrounding the manner in which Rogers was injured were quite different from those in the case before us. In the Rogers case, Rogers using a hand torch was burning weeds and other vegetable growth along a railroad track near a culvert; a train which passed fanned the fire which then threatened to engulf Rogers while he was looking at the passing train for hot boxes. To escape the danger, he retreated. Smoke reduced the visibility and in making his escape, Rogers slipped on loose gravel at the slope of the culvert. In holding that the evidence was sufficient to present a question for a jury, the United States Supreme Court said: "We think that the evidence was sufficient to support the jury finding for the petitioner. The testimony that the burning off of weeds and vegetation was ordinarily done with flame throwers from cars on the tracks and not, as here, by a workman on foot using a crude hand torch, *when that evidence is considered with the uncontradicted testimony that the petitioner was where he was on this narrow path atop the dirt 'dump' in furtherance of explicit orders to watch for hot boxes,* supplied ample support for a jury finding that respondent's negligence played a part in the petitioner's injury. These were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did. Common experience teaches both that a passing train will fan the flames of a fire, and that a person suddenly enveloped in flames and smoke

will instinctively react by retreating from the danger and in the process pay scant heed to other dangers which may imperil him. In this view, it was an irrelevant consideration whether the immediate reason for his slipping off the culvert was the presence of gravel negligently allowed by respondent to remain on the surface, or was some cause not identified from the evidence.

"The Missouri Supreme Court based its reversal upon its finding of an alleged admission by the petitioner that he knew it was his primary duty to watch the fire. From that premise the Missouri court reasoned that petitioner was inattentive to the fire and that the emergency which confronted him 'was an emergency brought about by himself.' It said that if, as petitioner testified, the immediate cause of his fall was that loose gravel on the surface of the culvert rolled out from under him, yet it was his inattention to the fire which caused it to spread and obliged petitioner 'to move blindly and fall,' and this was 'something extraordinary, unrelated to, and disconnected from the incline of the gravel at the culvert.'

"We interpret the foregoing to mean that the Missouri court found as a matter of law that the petitioner's conduct was the sole cause of his mishap. But when the petitioner agreed that his primary duty was to watch the fire *he did not also say that he was relieved of the duty to stop to watch a passing train for hot boxes. Indeed, no witness testified that the instruction was countermanded.* At best uncertainty as to the fact arises from the petitioner's testimony and in that circumstance not the court, but the jury, was the tribunal to determine the fact." (Emphasis ours).

After scrutinizing the opinion of the United States Supreme Court to determine what facts the court deemed

sufficient to support a finding of negligence, we are of the opinion that the court must have determined that the fire's being fanned by the passing train combined with the fact that Rogers was required to make an inspection of the passing train placed him in danger and that the defendant railroad could have foreseen such a result. We do not see how the fact that Rogers was furnished with a hand torch to set fires had any bearing on the question of defendant's negligence. Had a flame thrower from a car on the tracks been used, Rogers or some other employee would have been required to be present to watch and control the fire. So, we conclude that if Rogers had been relieved of the duty to be at a point near enough to the tracks to make an inspection of the train, a different result might have been reached. Suppose in the Rogers case a train had passed before Rogers started a fire and Rogers, in order to perform his duty of making an inspection of the passing train for hot boxes, had stepped backward and fallen down an embankment to his injury. Would the railroad have been held liable? We think not. That is the exact situation in the present case. We do not find any evidence in the record to support a finding of negligence on the part of the defendant contributing to plaintiff's injury. *Atlantic Coast Line R. Co.* v. *Craven*, 185 F.2d 176, l.c. 178, 179(2)(3)(4), and cases there cited.

Plaintiff cited a number of cases to support his theory. We need not discuss all of them. In *Cleghorn* v. *Terminal R. Assn. of St. Louis*, 289 S.W. 2d 13, the plaintiff on a dark night tripped over a black, unlighted switchstand. This court held that the evidence justified a finding that plaintiff had not been furnished a safe place to work. The same ruling was made in *Adams* v. *Atchison, T. & S. F. Ry. Co.*, Mo., 280 S.W. 2d 84, where plaintiff, an engineer, was injured. The negligence relied on was failure of an oncoming

train to have a gyrating headlight in operation, causing uncertainty due to such failure and a heavy fog.

In *Tiller* v. *Atlantic Coast Line R. Co.*, 87 L. ed. 610, 318 U.S. 54, the court held that every vestige of assumption of risk had been obliterated by the Federal Employers' Liability Act. In *Lavender* v. *Kurn*, 90 L.ed. 916, 327 U.S. 645, plaintiff's husband had been killed after throwing a switch to permit a train to back into the Grand Central Station at Memphis, Tennessee. Plaintiff's theory was that her husband, a switchman, had been struck on the head by a mail hook hanging loosely on the outside of a mail car of the backing train. The Missouri Supreme Court had reversed a judgment for plaintiff (reported at 189 S.W. 2d 253) on the theory that the evidence was insufficient to sustain a finding that the switchman had been struck by the mail hook. The U. S. Supreme Court held the evidence was sufficient. This court and the U. S. court were in agreement that if the switchman had been struck by the mail hook, such fact supported a finding of negligence.

The above cases disclose the rule to be that to support a verdict under the F.E.L.A., there must be present facts from which a jury may infer negligence and that such negligence did play a part in causing the injury complained of. *Moore* v. *Chesapeake & Ohio Railway Co.*, 340 U.S. 573, 95 L.ed. 547.

We hold that the record in this case is devoid of any evidence from which negligence on the part of the defendant may be inferred which contributed to cause plaintiff's injuries. The trial court was, therefore, right in directing a verdict for the defendant. The judgment is affirmed.

Henry J. Westhues,
Judge.

All concur, except Hollingsworth, J., who dissents in separate opinion filed.

APPENDIX B.

IN THE SUPREME COURT OF MISSOURI
EN BANC
SEPTEMBER SESSION, 1957

FRED FERGUSON,
Appellant,
vs.
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondent.
No. 45529.

Dissenting Opinion.

I am forced to dissent from the conclusion of the majority that a submissible case was not made. I believe the evidence would support a finding by the jury:

1. that by plaintiff's long use of the sidewalk as a place to clean lamps and defendant's knowledge of and acquiescence in such custom the sidewalk had become and was an established place of work not only for cleaning lamps but also as a point from which plaintiff necessarily would move in the inspection of instantly passing trains;

2. that in moving to make the inspection plaintiff of necessity would make some use of the sidewalk;

3. that the ditch immediately adjacent to the sidewalk was inherently and patently dangerous to any employee using the sidewalk in the prosecution of duties similar to those of plaintiff;

4. that in years gone by a steel guardrail had been maintained at the point where plaintiff fell into the ditch

and that it was reasonably feasible for defendant to have continued to maintain a similar device;

5. that, by reason of the premises, defendant was negligent in failing to furnish plaintiff with a reasonably safe place to work; and

6. that defendant's negligence directly contributed to plaintiff's fall and resultant injuries.

I would remand the case for trial on the merits.

Frank Hollingsworth, Judge.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 799.

FRED FERGUSON,
Petitioner,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSOURI.

BRIEF FOR RESPONDENT IN OPPOSITION.

JAMES L. HOMIRE,
Frisco Building,
St. Louis, Missouri,
FRANK C. MANN,
C. WALLACE WALTER,
810 Landers Building,
Springfield, Missouri,
Attorneys for Respondent.

INDEX

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 2

Statement 3

Argument 5

I. There is No Important Question of Federal Law or Conflict of Decisions 5

II. The Decision Below is Clearly Correct 9

Conclusion 18

Appendix 19

Citations

CASES

Brady v. Southern R. Co., 320 U. S. 476, 88 L. ed. 239, 64 S. Ct. 232 12

Chesapeake and Ohio Ry. Co. v. Burton, 4 Cir., 217 F. 2d 471 16

Eckenrode v. Pennsylvania R. Co., 335 U. S. 329, 93 L. ed. 41, 69 S. Ct. 91 (Affirming 164 F. 2d 996, 3 Cir.) 14

Gill v. Pennsylvania Railroad Co., 3 Cir., 201 F. 2d 718 (Certiorari denied 346 U. S. 816, 98 L. ed. 343, 74 S. Ct. 27) 16

Kenney v. Boston & Maine R. R., 33 A. 2d 557, 92 N. H. 495 ..... 10, 17

Palermo v. Luckenbach Steamship Co., Inc., 355 U. S. ....., 2 L. ed. 2d 3, 78 S. Ct. 12

Reynolds v. Atlantic Coast Line R. Co., 336 U. S. 207, 93 L. ed. 618 (Affirming 251 Ala. 27, 36 So. 2d 102) 16

Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500, 1 L. ed. 2d 493, 77 S. Ct. 443 ..... 6-7, 8, 13

Stone v. New York, Chicago & St. L. R. Co., 344 U. S. 407, 97 L. ed. 441, 73 S. Ct. 358 8

Wilkerson v. McCarthy, 336 U. S. 53, 93 L. ed. 497, 69 S. Ct. 413 12

Wolfe v. Henwood, 8 Cir., 162 F. 2d 998 (Certiorari denied 332 U. S. 773, 92 L. ed. 357, 68 S. Ct. 88) 11

STATUTE

Federal Employers' Liability Act, 35 Stat. 65, as amended, 36 Stat. 291, 53 Stat. 1404, 45 U. S. C., Sections 51, et seq. 2, 19

IN THE

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FRED FERGUSON,
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THE SUPREME COURT OF MISSOURI.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Supreme Court of Missouri *en banc*, adopting the opinion of Division One of that Court, is reported at 307 S. W. 2d 385.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

1. Whether this Court should review a decision of the Supreme Court of Missouri affirming the judgment of the trial court, which directed a verdict for respondent at the close of petitioner's case, when the record shows that the judgment below represents neither an unreasonable appraisal of the facts nor an abuse of judicial discretion in determining that the evidence adduced was insufficient to make a submissible case.

2. Whether there was substantial evidence from which there could reasonably be inferred actionable negligence on the part of the employer in failing to furnish a reasonably safe place to work, when a railroad employee's own proofs demonstrate that his duties did not require him to be at the place of alleged injury and that such injury resulted from his voluntary act in choosing such place to perform his duties, and from his voluntary actions thereafter.

STATUTES INVOLVED.

The pertinent provisions of the Federal Employers' Liability Act (35 Stat. 65, as amended, 36 Stat. 291, 53 Stat. 1404, 45 U. S. C., Sections 51, *et seq.*), which are set forth in Appendix, *infra*.

STATEMENT.

This litigation involves an action for damages on account of injuries allegedly sustained by petitioner while employed by respondent railroad as a lamp tender in respondent's yards at Joplin, Missouri. Petitioner pleaded several separate grounds of negligence (R. 5, 6). Subsequently he abandoned all of the charges of negligence except the alleged failure to furnish him a reasonably safe place to work in that there was no guard rail around a ditch. Respondent denied the allegations of negligence and pleaded petitioner's negligence (R. 9, 10).

Petitioner testified that while employed as a lamp tender in respondent's yards at Joplin, Missouri, on May 21, 1954, he stepped backwards from a sidewalk into a ditch (R. 40, 70, 82). This occurred about nine o'clock in the morning on a "moderate-like spring day." (R. 36, 37). Petitioner knew the ditch was there (R. 69). He had squatted on the sidewalk 13½ feet from the east rail of respondent's track to clean a switch stand lamp (R. 66, 67, 79, 84).

He could have chosen any place to clean the lamp—at many places where he cleaned switch stand lamps there were no sidewalks on which to clean them (R. 85). As far as the sidewalk was concerned, he could have chosen any other place thereon, in either direction therefrom and away from the ditch (R. 85, 86). The switch stand, sidewalk and ditch were located under the west edge of the old overpass or viaduct on East Seventh Street (R. 23, 31). The switch stand was 6 feet and 4 inches east of the east rail of the track and north of the sidewalk (R. 24, 65). The ditch was on the south side of the sidewalk (R. 24).

Petitioner testified that this concrete sidewalk was a public sidewalk (R. 83). The sidewalk ran generally east and west and respondent's railroad track ran north and south where it crossed the sidewalk (R. 80, 81). Petitioner had cleaned lamps on this sidewalk on previous occasions but not "back by the ditch." (R. 68, 69). There was no guard rail there at any time during the eleven years he worked as lamp tender (R. 71). There had been a guard rail at one time on the retaining wall, 16 feet from the east rail of the track, but it was removed about 1941 (R. 23, 76).

While squatting on the sidewalk, petitioner heard a train, looked up, and saw the passenger train approaching on respondent's track about 200 feet away (R. 38, 39). The train was moving slowly, approximately 8 to 10 miles per hour (R. 84, 143, 154). It was coming around the curve from the north (R. 38, 67). One of petitioner's duties was to make a "running inspection", which meant watching the train as it passed (R. 70, 71). Petitioner testified that in order to make this inspection he would have to be at least 18 to 20 feet from the east rail of the track (R. 79). To remove himself farther from the track for the purpose of making this inspection it would be necessary to go in an easterly direction along the sidewalk from the point where he was cleaning the switch lamp (R. 81). Petitioner did not so move along the sidewalk upon seeing the approaching train, but stepped backwards into the ditch (R. 40, 70, 82).

ARGUMENT.

I.

There Is No Important Question of Federal Law or Conflict of Decisions.

Petitioner lists as one of the questions presented for review, "* * * and whether his (petitioner's) negligence should be considered as a complete defense to the action, or merely in reducing the amount of recovery" (Petition, p. 5). There is nothing in the opinion below to indicate that the Supreme Court of Missouri entertained any concept that contributory negligence was a complete defense, as a reading of that opinion will disclose (Petition, Appendix A). Petitioner refutes his own contention at pages 10 and 11 of the Petition, where he states:

> "Thus it is demonstrated that the Missouri court determined as a matter of law that plaintiff's negligence was the *sole cause* of his injuries. This was a jury question, under recent decisions of this court.
>
> "*In other words the Supreme Court of Missouri holds, as a matter of law: First, that there was no negligence on the part of defendant;* and, second, that if there was negligence there was no causal connection between that negligence and plaintiff's injuries, but that plaintiff was the author of his own injury, or the court might well have said, misfortune." (Emphasis supplied).

Petitioner also urges that the Supreme Court of Missouri gave effect to the doctrine of assumption of risk (Petition, pp. 14 to 18, inclusive). The best answer to this contention is found in the opinion itself, where the Court states:

"In Tiller v. Atlantic Coast Line R. Co., 87 L. ed. 610, 318 U. S. 54, the Court held that every vestige of assumption of risk had been obliterated by the Federal Employers' Liability Act." (Petition, Appendix A, p. 7A).

It is respectfully submitted that the Supreme Court of Missouri was under no misapprehension as to either the effect of contributory negligence, as a mitigating factor only, under the Federal Employers' Liability Act, or as to the complete abolition of the doctrine of assumption of risk under that Act.

In presenting his case on appeal to the Supreme Court of Missouri, petitioner conceded that he was not entitled to have his case submitted to the jury unless there was substantial evidence from which reasonable inferences could be drawn that (1) respondent had negligently breached its duty to furnish petitioner a reasonably safe place to work, and (2) that respondent's negligent breach of that duty directly or proximately caused, in whole or in part, petitioner's injury. Such concession was consonant with the historic cause of action for negligence and the Federal Employers' Liability Act, under which this suit was brought, which is based on negligence. Such statements were altogether congruous with the principles of negligence and causation as lawyers and courts deal with them from day to day. Unless this Court is to superimpose upon those fundamental tenets as adopted and declared by Congress, a new and wholly different concept of the correlative rights and duties between employer and employee, it should, we respectfully submit, refuse to review the decision of the Supreme Court of Missouri in this case.

As stated so effectively by Mr. Justice Frankfurter in his dissenting opinion in *Rogers* v. *Missouri Pacific Rail-*

road Co., 352 U. S. 500, 1 L. ed. 2d 493, 527, 77 S. Ct. 443, and other cases decided with it, at l. c. 527:

> "The rule that the Court does not grant certiorari to review evidence is a wise rule, indeed indispensable to the work of the Court, and is as equally applicable to negligence cases as to any other type of case. Perhaps a word should be said about the basis of the cause of action under the Federal Employers' Liability Act. Liability under the Act is based on negligence. As far as the substantive cause of action is concerned, this is the historic cause of action for negligence as it has developed from the common law. It involves the same general concept on which is based every 'negligence case' in the state courts and in the multitudinous cases in the federal courts on diversity of citizenship in which the question is merely one of common-law negligence; that is, it is the familiar type of litigation that is part of the day-to-day business of state and federal trial judges."

If this Court were to deliberate upon and decide every set of facts presented to it in cases arising under the Federal Employers' Liability Act, then the role of the trial and appellate courts, both state and Federal, would indeed be a dubious one in this large area of litigation. More and more frequently this Court is faced with petitions for writs of certiorari in cases that turn on questions pertaining to the *judgment of facts*. Such is the case here. An experienced trial judge and six able Judges of the Supreme Court of Missouri—all save one—concurred in finding that petitioner did not make a submissible case and that respondent was entitled to a directed verdict at the close of petitioner's evidence. In deciding this question, both the trial court and the Supreme Court of Missouri were performing a duty entrusted to them by Congress when it placed concurrent jurisdiction of Federal Employers' Liability Act cases in

the State courts. Unless it can be fairly said that these Judges were unreasonable or capricious in assessing the evidence in this case, wherein is there justification for this Court to grant the writ which petitioner urges upon it? Mr. Justice Harlan, with compelling logic, covered the point in his dissenting opinion in *Rogers* v. *Missouri Pacific Railroad Co.*, *supra*, and other cases decided with it, when he said, at l. c. 519:

> "For my part, to overturn the judgments below simply involves second-guessing the Missouri Supreme Court, the Court of Appeals for the Seventh Circuit, and the Court of Appeals for the Second Circuit, on questions of fact on which they brought to bear judgments neither capricious nor unreasonable, and on which they made a 'fair assessment of a record.'
>
> "I dissent also for another reason. . No scientific or precise yardstick can be devised to test the sufficiency of the evidence in a negligence case. The problem has always been one of judgment, to be applied in view of the purposes of the statute. It has, however, been common ground that a verdict must be based on evidence—not on a scintilla of evidence but evidence sufficient to enable a reasoning man to infer both negligence and causation by reasoning from the evidence. Moore v. Chesapeake & O. R. Co., 340 U. S. 573, 95 L. ed. 547, 71 S. Ct. 428."

That the Supreme Court of Missouri appraised the facts fairly and with full knowledge of the provisions of the Federal Employers' Liability Act and the decisions of this Court construing it, is clearly evidenced by the opinion of that Court (Petition, Appendix A, pp. 1A to 7A, inclusive). It seems appropriate, at this point, to quote from the dissenting opinion of Mr. Justice Frankfurter in *Stone* v. *New York, Chicago & St. L. R. Co.*, 344 U. S. 407, 97 L. ed. 441, 447, 73 S. Ct. 358, where it is stated:

> "Congress very early gave emphatic proof that this was not the Court to sit in judgment upon the State courts every time a majority of this Court might view the evidence differently than the State court. In 1916 the Congress explicitly withdrew Federal Employers' Liability cases from the Court's mandatory jurisdiction and left them to be reviewed only when a determination by a State court involved a federal question of substance. 39 Stat. 726, 727."

Whether or not this Court might or might not agree with the trial court and with the overwhelming majority of the Supreme Court of Missouri, in their assessment of the record, should not be determinative in denying or granting the writ of certiorari. There is no reason to assume, and certainly there is nothing in the record to indicate, that in performing their duty they brought to bear anything other than a fair judgment of the facts. Likewise, there is no valid reason to believe that the Supreme Court of Missouri is either untutored in or unmindful of the duties entrusted to it by Congress in enforcing the Federal Employers' Liability Act. Moreover, the opinion below clearly manifests both a knowledge of and a proper regard for the decisions of this Court.

We respectfully submit that there is neither an important federal question nor a conflict of decisions here involved which would warrant a review by the Court and, therefore, the writ should be denied.

II.

The Decision Below Is Clearly Correct.

As hereinbefore indicated, petitioner has narrowed the allegations of negligence pleaded to the single charge that respondent was negligent in failing to furnish a reasonably safe place of work. If we assume that petitioner

was injured at a "place of work", within the meaning of the Federal Employers' Liability Act, then, of course, a duty arose on the part of respondent to use reasonable care to make such place of work reasonably safe. It would seem, however, that a place is not necessarily converted into a "place of work" simply because an employee happens to choose that place for the performance of his duties. Suppose, for example, that petitioner had decided to clean the lamp on the right of way of the Kansas City Southern Railroad, adjoining respondent's right of way on the east, and had there stepped into a ditch (R. 17)? Surely it would not be a tenable position that respondent would, under such circumstances, have had a duty to make such place reasonably safe as a place of work for petitioner. Yet, there is, in principle, no real difference between that situation and the one presented here. Logically, the first inquiry should be whether the place of injury is a place where the employee is required to work or, at least, one which the employer would reasonably expect to be used by its employees in the performance of their duties. In the instant case there was not even a scintilla of evidence that petitioner was ever told to clean the switch lamp, or perform any other duties, on the sidewalk or near the ditch. The only evidence that even touches the proposition is petitioner's negative testimony that he was never told not to clean the lamp on the sidewalk (R. 38). There was no evidence whatsoever that any of respondent's employees were ever ordered to use, or that they did use, the public sidewalk referred to in evidence in the performance of their duties. As stated in *Kenney* v. *Boston & Maine R. R.*, 33 Atl. 2d 557, 560, 92 N. H. 495, wherein a brakeman was killed when he fell as he alighted from a train at night on an unrailed bridge:

"The deceased was not performing such work that the bridge was his contemplated work-place, findably requiring a rail for his protection * * *."

Although petitioner testified on redirect examination that an assistant foreman had seen him working on the sidewalk "at that particular place" (R. 76, 77), on cross examination he denied that he was "back by the ditch" on the previous occasions (R. 68, 69). It is also noteworthy that petitioner did not testify as to when, during the eleven years he was employed as a lamp tender, respondent's assistant foreman had seen him. Was it eleven years before the occasion in question? The record is silent on this point. Should respondent, under the evidence in this case, be held to have reasonably foreseen that petitioner would squat on the sidewalk, at a place in close proximity to, and with his back toward, the clearly visible ditch? The switch stand was located north of the sidewalk, 6 feet and 4 inches from the east rail of the track (R. 24, 65). The ditch was on the south side of the sidewalk (R. 24). Petitioner voluntarily chose to clean the switch lamp at a point near the ditch, 13½ feet from said rail (R. 66, 67, 79, 84). He admitted that he could have cleaned the lamp anywhere and that at many places where he cleaned lamps there were no sidewalks (R. 85, 86).

Even if it is assumed that respondent could reasonably have foreseen that petitioner would clean the switch lamp on the sidewalk, there was no reason to anticipate that he would choose a place near an open, familiar ditch (R. 85, 86). The test of foreseeability in determining negligence is a well established principle of law under the Federal Employers' Liability Act, as well as in common law cases. Petitioner so noted in his brief which was filed in the Supreme Court of Missouri. As stated in *Wolfe* v. *Henwood*, 8 Cir., 162 F. 2d 998 (Certiorari denied 332 U. S. 773, 92 L. ed. 357, 68 S. Ct. 88), at l. c. 1000:

> "But defendant's obligation was not such as to impose liability for injury regardless of due care and regardless of whether the injury was one reasonably to be anticipated or foreseen as a natural consequence of defendant's act."

It is earnestly submitted that it was not incumbent upon respondent to guard against such unusual use of the sidewalk as that made by petitioner, even if it were shown that respondent had a right of control over the public sidewalk and the right to erect a guard rail thereon. The situation is analogous to that in *Brady* v. *Southern R. Co.*, 320 U. S. 476, 88 L. ed. 239, 245, 64 S. Ct. 232, in that it was the unusual purpose and manner of the use of the sidewalk that brought about the injury. In the *Brady* case this Court stated, l. c. 245:

> "The Supreme Court of North Carolina was of the view that striking a derailer from the unexpected direction 'was so unusual, so contrary to the purpose' of the derailer that provision to guard against such a happening was beyond the requirement of due care. With this we agree."

In *Wilkerson* v. *McCarthy*, 336 U. S. 53, 93 L. ed. 497, 504, 69 S. Ct. 413, this Court was passing upon an entirely different factual situation than that involved here. It was stated in the majority opinion delivered by Mr. Justice Black, at l. c. 504:

> "We agree with this last quoted statement of the Utah court, and since there was evidence to support a jury finding that *employees generally had habitually used the board as a walkway*, it was error for the trial judge to direct a verdict in favor of respondents." (Emphasis supplied).

In *Palermo* v. *Luckenbach Steamship Co., Inc.*, 355 U. S. ....., 2 L. ed. 2d 3, 78 S. Ct. ....., cited by petitioner, this

Court was again dealing with an unlighted *walkway used by employees*, made dangerous by oil and grease.

Rogers v. *Missouri Pacific Railroad Co., supra,* on which petitioner leans so heavily, is also distinguishable. As has been cogently pointed out by the Supreme Court of Missouri in its majority opinion, "The circumstances surrounding the manner in which Rogers was injured were quite different from those in the case before us". The charge of negligence which this Court found was sustained by the evidence in the *Rogers case* was that Rogers was "*required to work at a place* in close proximity to defendant's railroad tracks, whereon trains moved and passed, causing the fire from said burning weeds and the smoke therefrom to come dangerously close to plaintiff and requiring plaintiff to move away from said danger." (Emphasis supplied).

The opinion below quotes from the majority opinion of this Court in the *Rogers case,* delivered by Mr. Justice Brennan (Petition, Appendix A, pp. 4A, 5A), as follows:

> "'The testimony that the burning off of weeds and vegetation was ordinarily done with flame throwers from cars on the tracks and not, as here, by a workman on foot using a crude hand torch, *when that evidence is considered with the uncontradicted testimony that the petitioner was where he was on this narrow path atop the dirt "dump" in furtherance of explicit orders to watch for hot boxes,* supplied ample support for a jury finding that respondent's negligence played a part in the petitioner's injury. These were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did. Common experience teaches both that a passing train will fan the flames of a fire, and that a person suddenly enveloped in flames and smoke will instinctively react by retreating from the danger

> and in the process pay scant heed to other dangers which may imperil him. In this view, it was an irrelevant consideration whether the immediate reason for his slipping off the culvert was the presence of gravel negligently allowed by respondent to remain on the surface, or was some cause not identified from the evidence.'" (Emphasis supplied by Supreme Court of Missouri).

In *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329, 93 L. ed. 41, 69 S. Ct. 91, this Court affirmed the opinion of the lower court in 164 F. 2d 996, 3 Cir., wherein the Court of Appeals stated, at l. c. 1000:

> "Even if it may be inferred that he was trying to sand the tracks with it, it is too much to say that McGowan or other members of the train crew are to be charged with negligence in failing to anticipate this completely unexpectable operation on Eckenrode's part."

Just as respondent was not required to contemplate that petitioner would negligently choose a place on the sidewalk near the ditch to clean the lamp, it was not required to foresee further lack of care on the part of petitioner for his own safety in stepping backwards into the ditch. Such action was flagrant negligence and employers are not required to anticipate that experienced employees will act in utter disregard of their own safety. It should be noted that petitioner was faced with no emergency as was the petitioner in the *Rogers case*, who was retreating from enveloping flames and smoke when he fell. Petitioner Ferguson had ample time after he heard the train whistle to move safely to a place from which he could inspect the train, if in fact such movement was at all necessary. The train was still 200 feet away from petitioner when he saw it approaching and he was then 13½ feet from the track on which it was traveling (R. 39, 84).

He testified that it was moving slowly (R. 84). The engineer and fireman testified that the train was traveling approximately 8 to 10 miles per hour (R. 143, 154). There was no reason for haste and there was no reason for the plaintiff to move toward the ditch, the direction in which the train was traveling. By so doing he was not moving farther away from the track, which, according to his testimony, was what he should do to make a "running inspection" of the train. In the majority opinion below the Supreme Court of Missouri points out, at page 3A, Appendix A of Petition:

> "Plaintiff, in oral argument, conceded that the place to clean the lamp was not unsafe; also that the place to make the inspection of the train was not unsafe. But that the combination of the duties, that is, transferring from the duty of cleaning the lamp to that of inspecting the oncoming train, required him to move back to a position from which he could make the inspection; that in so doing, he stepped off into the ditch; that, therefore, the place was unsafe. To this we cannot agree."

For the reasons indicated above, it is submitted that there was no evidence of negligence on the part of respondent, but there are additional reasons why the Supreme Court of Missouri correctly stated that, "We hold that the record in this case is devoid of any evidence from which negligence on the part of the defendant may be inferred which contributed to cause plaintiff's injuries. The trial court was, therefore, right in directing a verdict for the defendant. The judgment is affirmed." (Petition, Appendix A, p. 7A).

Was not the existence of the street, sidewalk and open ditch a mere condition, under the circumstances shown in evidence, without legal causal connection to the alleged

injury to petitioner? In *Chesapeake and Ohio Ry. Co.* v. *Burton*, 217 F. 2d 471, 474, 4 Cir., a conductor was attempting to signal motorists, after the train had stalled on the crossing and was struck by a motor vehicle. The Court there stated, at l. c. 474:

> "Burton decided himself on his course of conduct after the train stalled. He could easily have chosen a safe place or position from which he could have signalled with his torch to approaching drivers of motor vehicles. In such a situation any negligence of the railroad in stopping the train created a mere condition which had no causal connection to the injury received."

In *Reynolds* v. *Atlantic Coast Line R. Co.*, 336 U. S. 207, 93 L. ed. 618, this Court affirmed the decision of the Supreme Court of Alabama, 251 Ala. 27, 36 So. 2d 102, where that Court stated, at l. c. 106:

> "It is not alleged that he was not free to handle his own movements, or that any superior's orders required him to pursue the course of conduct which he did pursue. It cannot be said that the omission to provide sufficient and competent help was the primary moving cause which in the natural and probable sequence of events, and without the intervention of a new or independent cause, produced Reynolds' fall between the cars, and his death."

In this connection, we should also like to cite *Gill* v. *Pennsylvania Railroad Co.*, 3 Cir., 201 F. 2d 718, 721 (Certiorari denied 346 U. S. 816, 98 L. ed. 343, 74 S. Ct. 27). There the railroad employee was ordered to work beneath the racks in a box car. He had previously injured his left knee, which had required surgery and had disabled him for approximately seven months. He had returned to work shortly before the date of the injury in question. The

racks beneath which he was working were so slow that it required the plaintiff to hold his injured knee in an awkward position. His knee became cramped and painful, and being unable to stand up under the racks, he started to back out and stood up when he erroneously thought he was clear of the racks. The Court there held that, even assuming that the railroad was negligent, there was no causal connection between such negligence and the injury, and that, as a matter of law, the case should not have been submitted to the jury. The Court stated, at l. c. 721:

> "The immediate cause of the accident was succinctly stated by the plaintiff at the trial and by his counsel in his brief. We quote from the record:
>
> "'A. Well, I was trying to get out of the car, and I come out and I thought I was clear of the racks, and I raised my head up and hit my head.
>
> "'Q. In other words, you misjudged your position? A. Yes.'
>
> "There is nothing in the record to contradict this critical admission, and counsel in his oral argument so conceded."

True, petitioner Ferguson did not testify that he misjudged his position on the sidewalk, but the fact remains that in broad daylight he voluntarily stepped backward and into the ditch, with full knowledge of its existence and location (R. 40, 70, 82, 69). As stated by the Supreme Court of New Hampshire in *Kenney v. Boston & Maine R. R. Co.*, *supra*, at l. c. 561:

> "If he had known where he was and had stepped off as he did, his negligence would have been the sole proximate cause of his injuries and death."

Petitioner has now taken a rather startling position, one squarely opposed to that taken by him in the Supreme Court of Missouri, to-wit—that the Federal Employers' Liability Act "eliminates the question of causation" (Petition, p. 18). Note the sophistical statement that, "Now we

are to determine what injuries 'resulted' from the carrier's negligence, rather than what 'caused' the injury" (Petition, p. 19). Surely such expression can only grow out of a fruitless wandering in the wilderness of semantics. What is the difference in causal relation between "A caused B" and "B resulted from A"? Respondent submits that it is exactly the same difference as that between "A hit B" and "B was hit by A". The fact that the Supreme Court of Missouri did not subscribe to such a strained construction of the decisions of this Court as that now urged by petitioner, further demonstrates the correctness of the decision below.

CONCLUSION.

It is respectfully submitted that the petitioner had a fair hearing in both the trial court and the Supreme Court of Missouri, and that no right or privilege granted him under the Federal Employers' Liability Act has been violated. Rather, the evidence in this case does not sustain a right to recover under that Act and the Supreme Court of Missouri, *en banc*, properly so declared. Its decision was reached after careful consideration and pursuant to the duty imposed upon it to determine the sufficiency of the evidence.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES L. HOMIRE,
Frisco Building,
St. Louis, Missouri,

FRANK C. MANN,
C. WALLACE WALTER,
810 Landers Building,
Springfield, Missouri,
Attorneys for Respondent.

APPENDIX.

Federal Employers' Liability Act, 45 U.S.C., Section 51, et seq.

Section 51 of said Act provides as follows:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, sec. 1, 53 Stat. 1404."